No. 243.

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JAMES H. McKENNEY,
Clerk.

BRIEF OF APPELLEE.

Brief of Field for Appellee.

Supreme Court of the United States.

Filed April 15, 1901.

OCTOBER TERM, 1900.

No. 243.

BARBARA CHAVEZ DE ARMIJO,
Appellant,

vs.

JUSTO R. ARMIJO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

NEILL B. FIELD,
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Supreme Court of the United States.

October Term, 1900.

BARBARA CHAVEZ DE ARMIJO,
No. 243. Appellant,
vs.
JUSTO R. ARMIJO.

Brief of Appellee.

STATEMENT OF THE CASE.

This transcript, as made up by the clerk of the supreme court of New Mexico, and by the clerk of the trial court, is somewhat confusing. It is quite clear, however, that counsel for appellant in his attempt to state the record has fallen into error as to one very important claim made by him, as to which the transcript shows, he is mistaken. The transcript does not purport to contain all of the evidence considered by the referee. It is possible that the rules of the supreme court of New Mexico are, to some extent, responsible for the confusing character of the transcript, but if this be true, the confusion is due to the act of the counsel of appellant, who represented her in the courts below, and who directed how the transcript should be made up for the supreme court of New Mexico. By rules

adopted August 25th, 1897, and in force after September 1st, of that year, it is provided :

RULE III.

1. All motions, affidavits and other papers filed, and all orders made during the pendency of any suit in the district court, shall be considered a part of the record of said cause without being incorporated in a bill of exceptions; but only such motions, affidavits and papers and orders which may be necessary for a proper determination of questions or issues to be reviewed in the Supreme Court upon appeal or writ of error, shall be incorporated in the transcript of the record transmitted to it.

Whenever it is desired to review the action of the trial Court upon any point or points not involving all of the record and evidence offered on the trial, the appellant or plaintiff in error may serve upon the opposite party, according to the provisions of the code, a transcript of all the record and evidence upon such point or points; the appellee or defendant in error may serve upon the appellant or plaintiff in error any portion of the record or evidence which he claims to have been omitted and to be necessary to a proper review of the question or questions to be raised, and the judge of the trial court shall determine whether such transcript contains all the records or evidence upon such points, and may require the addition of any portion thereof which he deems to have been omitted. Whereupon the judge of the trial court shall certify to the supreme court that the transcript as so settled contains all the record and evidence upon the point or points specified.

The appellant or plaintiff in error shall file in the office of the clerk of the district court a præcipe setting forth the questions he desires to have reviewed and those portions of the record and proceedings he deems necessary to such review, and he shall be bound in the supreme court by the præcipe so filed.

If in such cases the opposite party desires to take up more of the record or evidence than the trial judge determines to hear upon the points to be

reviewed, he may have the additional evidence or parts of the record certified by the judge filed in the clerk's office and by him certified with the rest of the record, and cause the same to be filed in the supreme court at his own expense in the first instance, and, if the supreme court shall hold that the same was necessary to a proper hearing of the case, such expense shall afterwards be taxed in the supreme court as other costs in the case.

In case the whole evidence is taken up, it shall not be necessary for the trial judge to certify, but he may do so at the request of either party.

When the transcript of the record transmitted to the supreme court upon an appeal or writ of error shall contain portions of the record not necessary for a proper determination of the questions or issues to be reviewed by the supreme court, the costs of transcribing or printing such unnecessary portions of the record will be taxed against the party procuring the same.

3. No *certiorari* for diminution of the record shall be allowed in any cause unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit, and all motions for such *certiorari* shall be made at the first day of the term of the entry of the cause, otherwise the same shall not be granted unless upon special cause shown to the court accounting satisfactorily for the delay.

4. The *applicant* or plaintiff in error shall not be heard to suggest a diminution of the record or to ask for a *certiorari* to supply such diminution in any case where such plaintiff in error has caused to be certified to this court less than the entire record, unless such suggestion or motion shall be made on the first day of the term to which the appeal or writ of error is returnable, and shall be accompanied by an affidavit setting forth reasons satisfactory to the court for the omission of the same from the transcript; *mere neglect to include the desired portion of the record in the præcipe shall not be sufficient cause* for the award of the *certiorari* applied for.

Evidently attempting to act under the authority of this rule, counsel for appellant filed in the office of the Clerk the *praecipe* found on page 116 of the transcript, as follows :

> To HARRY P. OWEN, Clerk :
>
> You will please make out a transcript to be used in the above cause on appeal, of the following :
>
> 1. Declaration.
> 2. Defendant's pleas.
> 3. Replication.
> 4. Order of Reference.
> 5. Report of Referee, and *Oral* Testimony taken before Referee.
> 6. Exceptions to Referee's Report and Motion.
> 7. Final Decree.
> 8. Supersedeas Appeal Bond and Approval thereof.
> 9. Motion of Defendant for entry of Appeal.
> 10. Order overruling same.
> 11. This *praecipe*.
>
> WARREN & FERGUSON,
> Attorneys for Defendant.

This *praecipe* appears to have been filed on the 20th day of October, 1899, and in pursuance of it, on the second day of November, 1899, the clerk made a transcript and certified the same as follows :

> I, HARRY P. OWEN, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in accordance with the command contained in the foregoing writ of error, make return thereto by sending to the Supreme Court of the Territory of New Mexico, the foregoing, which I hereby certify to be a true, correct and complete *transcript of so much of the record and proceedings* had in that certain cause lately pending in the District Court for the County of Bernalillo, wherein Justo R. Armijo was plaintiff, and Barbara Chavez de Armijo was defendant, *as was ordered to be certified by the defendant in error, Barbara Chavez de Armijo*, in said cause, as the same appears of record, and on file in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court on this 2d day of November, A. D. 1899.

HARRY P. OWEN,
Clerk.

[SEAL.]

Trans., pp. 116–117.

Following the certificate of the clerk above quoted there is found in the printed transcript this statement:

> Now, on this 18th day of November, A. D. 1899, comes the defendant, by her attorneys, and presents to the court the foregoing bill of exceptions, to be by the court sealed, signed and settled as such, notice thereof having been duly given to the plaintiff, he being present by counsel; but the court declines and refuses to so sign, seal and settle the same, whereupon defendant excepts to the action of the court.
>
> J. W. CRUMPAKER,
> Judge.

This statement by the judge is dated, and appears to have been signed sixteen days after the clerk's certificate, and to be not otherwise authenticated than by the signature of the judge. When the transcript is examined to ascertain what was presented to the judge for his signature, there is found on page 11 the introductory words ordinarily used at the beginning of a bill of exceptions:

> Be it remembered that on the trial of the above-named cause the following proceedings, among others, were had, and that the evidence hereinafter set forth was introduced, and that the objections and exceptions made and taken to such evidence as hereinafter appears were made and taken at the time the evidence was offered, and the rulings of the court were made as to the same, as is set forth in such evidence, and that the evidence hereafter set out was all the evidence introduced and received on the trial of said cause.

It must, I think, be assumed that all of the matter contained in the transcript between the top of page 11 and the signature of the trial judge on page 117, was presented to the trial judge as a bill of exceptions, and that he declined to sign the matter thus presented to him as a bill of exceptions in the cause. If it were incumbent on me to show, affirmatively, by the transcript, that the refusal of the trial judge in this regard was proper, I should merely call attention to the fact, disclosed by the transcript, that more than 50 exhibits, which were offered in evidence by the plaintiff, are omitted from the so-called bill of exceptions, and that, notwithstanding this omission, the trial judge was asked to certify " that the evidence hereafter [in the bill of exceptions] set out was all the evidence introduced and was received on the trial of said cause " *(Transcript, p. 11).*

Counsel for appellant ignores the existence of these fifty odd exhibits and asserts and re-asserts in his brief that all of the evidence considered by the referee was before the supreme court of New Mexico, and that the transcript shows that fact.

Although sub-section 1 of rule 3 of the rules of the supreme court of New Mexico, above quoted, dispenses with the necessity for incorporating a motion for a new trial in the bill of exceptions, as had been formerly held to be necessary, it did not, nor did any other rule or statute of New Mexico (apart from the act of March 16, 1899, set out on pp. 13, 14, 15, of my brief on motion to dismiss), attempt to dispense with the necessity for filing a motion for a new trial, in order to lay the foundation for a review of the proceedings, in an action at law.

The Act of March 16, 1899, was passed six months after the entry of the judgment in this case. This judgment was entered in vacation and not in the term time *(Compiled Laws, 1897, Section 909).*

Under the law as it stood at the time of entry of the judgment no motion to set it aside could be entertained

unless filed and a copy thereof served upon the opposite party within ten days after the entry of the judgment *(Compiled Laws 1897, Sub-section 134 of Section 2685)*.

It is suggested by counsel for appellant that the filing of exceptions to the referee's report is the legal eqvivalent of a motion for a new trial and must be so considered. If this contention is to be sustained we have in this case the anomaly of a motion for a new trial filed thirteen days before the rendition of the judgment sought to be reviewed.

Counsel for appellee understands the supreme court of New Mexico to have held that, there having been no motion for a new trial filed in the court below and no substantial compliance with the statute, so as to make the evidence taken before the referee a part of the record, and no bill of exceptions or anything equivalent thereto, whereby the rulings upon evidence were properly preserved it was unable to make findings of facts in the nature of a special verdict, because the evidence in the case was not before it.

It is cheerfully conceded that the appeal operated to divest the district court of Bernalillo county and to invest the supreme court of New Mexico with full jurisdiction in this cause; that no citation was necessary and that the notice of appeal and the approval of the supersedeas bond were sufficient in law to remove the case into the supreme court without any order granting an appeal, or any other step taken in the district court. When the supreme court of New Mexico directed it to be certified to this court, that that court "for reasons disclosed by the judgment is unable to find the facts, the appeal not having been perfected in such manner as to bring the facts of the case into this court," it had no reference to any supposed insufficiency in the appeal as taken, but referred entirely to the proceedings in the district court, whereby the appellant had failed to have the evidence made a part of the record of the case in that court.

As to the proceeding by writ of error in the supreme court of New Mexico, it seems sufficient to suggest that, by statute, in that territory, distinctions between appeals and writs of error have been abolished, and a party desiring a review of any cause has his election to proceed by either method. *Compiled Laws 1897, Section 2685, Sub-Section 161*, is as follows :

> SUB-SEC. 161. Any person aggrieved by any final judgment or decision of any district court in any civil cause, may, at his election, take an appeal or sue out a writ of error to the supreme court of the territory at any time within twelve months after entry of the same, and have a supersedeas in the same manner as now provided by law in cases of appeals and writs of error.

Although appellant prosecuted both remedies in the supreme court of New Mexico, it is apparent from the transcript that that court treated the proceeding by writ of error as mere surplusage, and that it is inaccurate to say, as is said by counsel for appellant, on page 26 of his brief, "that the supreme court dealt with the case on appeal for one purpose, and the case on error for another." While the transcipt discloses the fact that the case was thus docketed in the supreme court of the territory, it also shows that the judgment of the court below was affirmed, and judgment was entered in the supreme court against the appellant and the sureties on her supersedeas bond in the case on appeal, and that this appeal is prosecuted from that judgment. If the transcript does not show that the two causes were treated as one by the supreme court of New Mexico, it fails to show that the case on error is not yet pending there, because it fails to show any independent disposition of case No. 840 in that court, but does show a judgment in case No. 847 which was the case on appeal.

Four of the six assignments of error in this court are grounded on the alleged action of the supreme court of New Mexico in dismiss-

ing the appeal and writ of error. As matter of fact no such action was taken by that court, and neither the appeal nor the writ of error was dismissed. If there were two cases pending in that court were both brought into this court by one appeal? Looking to the substance of the matter, it is manifest that the court did not "deal with the case on appeal for one purpose and with the case on error for another."

I submit that there is but one question open to review on this record, *i. e*: Do the allegations of the declaration support the judgment? That the suggestion that this case should be sent back to the supreme court of New Mexico with instructions to make findings of fact is utterly without merit, and that this court cannot, on this appeal, remand the case for any such purpose, because, to do so, would be to require that court to make such findings without opportunity to consider the documentary evidence upon which the findings of the referee, as appears from his report, are in a large measure based.

The entire case on behalf of appellant consists of an appeal to this court to ignore the provisions of the act of congress from which it derives its authority to review cases such as this, and to consider evidence brought up in violation of the express provisions of that act for purposes not within the contemplation of the act. A careful analysis of the contention of counsel will show that his ground of complaint is not that the territorial supreme court failed to make findings of fact in the nature of a special verdict, but that, that court failed to review the action of the referee on the admission and exclusion of evidence. It seems to be the opinion of counsel that without findings of facts an error of this character cannot be examined; at least, there is no error assigned which raises this question, if it had been property preserved for review here.

It will be shown, I think, conclusively that such action of the referee was not open, and could not have

been open, to review either in the supreme court o the territory or in this court upon any record tha could have been made up, so long as the hearing be fore the referee was had without the consent of th appellee, and, certainly, that no such review is pos sible upon this record.

The collection of the judgment in this case has bee stayed by *supersedeas* for two years and a half, and it i respectfully submitted that the appeal must have bee taken for delay, only. Appellee therefore asks that th court will award him damages, in accordance with th provisions of its rules.

POINTS AND AUTHORITIES.

I.

This case having been referred, on mo tion of appellant, over objection by appel lee, the rulings of the referee on the ad mission or exclusion of evidence are no open to review.

The statute of New Mexico, set out at length in my brief on motion to dismiss or affirm, provides tha causes may be referred by the court upon condition which are there enumerated. If this statute is to b construed as attempting to confer power upon th court to refer cases such as this over the objection o one of the parties, such construction would clearly render the statute unconstitutional and void. By ex press provision of an act of congress, too familiar t this court to require citation, the right of trial by jury is preserved in the various organized territories of th United States, and territorial legislatures are forbid

den to pass laws which deprive litigants of the right to trial by jury. That this case is one in which the parties had a constitutional right to a jury trial cannot be questioned. It therefore follows that when the appellant, by her counsel, asked the court to refer the case to a referee, she, upon her own motion, obtained a trial by and the decision of a tribunal unknown to the statutes of the United States or of the Territory of New Mexico, and is bound by the action of that tribunal in so far as that action relates to the referee's ruling upon questions of evidence.

The point here sought to be made has been so often determined by this Court, upon analogous facts, that it cannot be considered as open to further discussion.

Bond vs. Dustin, 112 U. S., 604.
Paine vs. The Central Vermont R. R., 118 U. S., 152.
Roberts vs. Benjamin, 124 U. S., 64.
Andes vs. Slauson, 130 U. S., 435.
Dundee Mortgage Co. vs. Hughes, 124 U. S., 157.
Boogher vs. Insurance Co., 103 U. S., 95.

II.

The claim that appellant has not had her day in the supreme court of New Mexico, is not supported by the record.

In the closing paragraph of his brief, counsel for appellant says: "The appellant has not had her day in the appellate court. She is entitled to this. She did what she could to have the case reviewed. We ask the protection of this court." The supreme court of New Mexico was not charged with the duty of superintending the preparation of appellant's case, and its presen-

tation to the trial court. It could only act upon the record as it found it. The reports of the decisions of this court are full of cases in which the this court has declined to examine the facts of cases attempted to be brought irregularly before it, for substantially the same reasons, and under substantially the same conditions disclosed by the transcript in this case, except that it is believed that no case can be found where this court has been asked to examine evidence appearing in a transcript without any authentication whatever, as is the condition here.

The necessity for a bill of exceptions, "or something equivalent thereto," in order to make evidence a part of the record in cases, tried with or without a jury, has been insisted upon by this Court from the very earliest case in which the question arose until the present time, and it seems manifestly unfair to the territorial supreme court that the suggestion quoted should be made. There was no motion for a new trial; the documentary evidence was omitted from the transcript by direction of appellant's counsel; there was no certificate to the oral evidence, either from the referee or court stenographer; the trial judge refused to sign a propose bill of exceptions, which shows upon its face, if it may be looked to, that it contained a false recital, in that it purported to contain all the evidence whereas it contained none of the documentary evidence. The appellant made no effort to obtain a certificate from the referee, or from the court stenographer, authenticating the evidence used before the referee, but now asks this court to presume error and reverse the case, or send it back to the supreme court of New Mexico upon the claim that she has not had her day in that court.

The statutes of New Mexico require authentication of evidence before it can become part of a record in any case. In some instances it must be authenticated by the court stenographer, in others, by the referee, and in still others, by the trial judge, but in every

imaginable case, evidence, in order to become part of a record, must be authenticated by somebody. The so-called evidence in this case is not authenticated by any one.

In the absence of a motion for a new trial there could be nothing before the supreme court of New Mexico except the judgment-roll. This, as is shown by the decisions cited in the brief on motion to dismiss or affirm has been the settled rule in New Mexico from the time of the organization of the supreme court of that territory.

The contention that the exceptions to the report of the referee are to be taken as and for a motion for a new trial, is well met by the reasoning of the supreme court of Missouri :

> But it is urged that exceptions to a report of a referee take the place of a motion for a new trial; that they stand as and for such a motion. * * *
>
> The exceptions to the report of the referee are filed for the purpose of calling upon the trial court to review the rulings of the referee. This must be done before the confirmation of the judgment. It is the purpose of the motion for a new trial to give the trial court an opportunity to correct its own errors and to award a new hearing, if that be necessary to correct any errors that may have been made. We see no reason for departing from what has been heretofore said. The exceptions taken in this case and before noted, are such as can only be preserved in a bill of exceptions, and there having been no motion for a new. trial, they cannot be considered here.
>
> *State ex rel. Walker vs. Hurlstone, 92 Mo., 331-2.*

See also,

Hosford vs. Stone, 6 Neb., 378.
Perez vs. Barber (N. M.), 34 Pac. Rep., 190.
Grayson vs. Lynch, 163 U. S., 468.
Dietz vs. Lymer, 63 Fed. Rep., 758.
Kleinschmidet vs. Iler, 6 Mont., 122.

III.

What is claimed to be the oral evidence, as contained in this transcript, is not properly before the court, and cannot be considered for any purpose.

Counsel for appellant, in his brief, makes frequent reference to what was done by the referee and to the efforts of his client to obtain a review of the referee's action. On pages 15, 16 of his brief, he says:

> The record distinctly shows that plaintiff below, himself, testified that his services were rendered under a written agreement between the parties (p. 36, Record), and that said agreement had been written and signed upon page 988 of the letter-press copy-book offered in evidence (Record, p. 47), and that said page containing such alleged written agreement had been removed from said book and was lost.
>
> Upon the facts testified to by plaintiff, we submit that, while evidence of the contents of the lost paper might have been admissible in evidence, it was clearly an error decisive of this cause to permit a recovery upon testimony of plaintiff to the value of such alleged services upon a *quantum meruit* as reported by the referee and entered by the court (Rec., 122).

It is difficult to understand the purpose of this. Findings of fact by the supreme court of New Mexico are not required to enable this court to review action such as is here complained of, if it properly appears upon the record. There is, however, no assignment of error which calls in question this ruling by the referee, if it had been properly certified up from the court below, nor is there any reason apparent why this particular ruling should be called specially to the attention of this court.

If it appears affirmatively that the supreme court of New Mexico should have made findings of fact, and if

its failure to make such findings, in a proper case, is reversible error, appellant has the benefit of this contention, without asking this court to consider whether the action of the referee thus insisted upon was rightful or not. Such consideration will throw no light upon the propriety or impropriety of the action of the supreme court in failing or refusing to make findings of fact. I insist that the action of the referee (at least such action as was had prior to the filing of his report in the district court), is not before the court for any purpose, and that certainly no advantage can be obtained on behalf of appellant by reason of the fact that she has caused unauthenticated evidence to be sent up to this court and printed in the transcript. This court has said:

> It must also be borne in mind that, as already seen, in either class of cases, whether equitable or legal, coming up by appeal from a Territorial Court after a hearing or trial on the facts, the evidence at large cannot be brought up (as it is in cases in equity from the Circuit Courts of the United States), but only "a statement of facts in the nature of a special verdict," and rulings made at the trial, and duly excepted to, on the admission or rejection of evidence. *Idaho and Oregon Land Co. vs. Bradbury, 132 U. S., 514.*
>
> We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. *Hecht vs. Boughton, 105 U. S., 236.*

This court will indulge every presumption in favor of the regularity and validity of the judgment appealed from, and will not reverse it, unless error to the prejudice of the appellant is made to appear affirmatively. Defects in the record arising out of the negligence of counsel for appellant can certainly not be urged here in support of reversal, and it has been sufficiently

shown that whatever obstacle to a complete review of this case may exist, is the direct result of appellant's own action: First, in obtaining a reference against the consent of appellee, and afterwards in failing to make a motion for a new trial and in failing to secure the evidence to be properly preserved upon the record. There being no findings of fact and no rulings on evidence properly certified, there is, in the language of this court, nothing to review.

Young vs. Amy, 171 U. S., 179.
Naeglin vs. De Cordoba, 171 U. S., 638.
Halloway vs. Dunham, 170 U. S., 615.
Harrison vs. Perea, 168 U. S., 311.
Mining Co. vs. Machine Co., 151 U. S., 447.

IV.

The appellee asks that he be awarded damages as for a vexatious and frivolous appeal.

In this case the appeal, which was made to operate as a supersedeas, by the execution of bonds both in the supreme court of the territory and in this court, must have been taken for delay only, and upon the record the case appears to be clearly within the recent decisions of this court awarding damages under the provisions of clause 2 of rule 23 of this court.

Palmer vs. Arthur, 131 U. S., 60.
Wilson vs. Everett, 139 U. S., 616.
Mining Co. vs. Starr, 141 U, S., 222.
Texas, etc., R. R. Co. vs. Volk, 171 U. S., 73.
Nelson vs. Flint, 166 U. S., 276.

It is respectfully submitted that there is no error apparent upon the face of the record, and that the judgment of the court below should be affirmed with costs and damages.

NEILL B. FIELD,
Attorney for Appellee.

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